## APPENDIX A

### UNITED STATES COURT OF APPEALS
### SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and

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United States ex rel. Edward Vassallo,

Relator-Appellant,

v.

Arthur Rubin, Warden of the Queens House of Detention for Men,

Respondent-Appellee.

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It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated July 2, 1974 for a certificate of probable cause be and it hereby is denied.

s/ James L. Dohi
s/ Marvin E. Frankel, U.S.D.J.
s/Robert J. Keller, U.S.D.J.
Circuit Judges

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel. EDWARD VASSALLO,

Relator,

-against-

ARTHUR RUBIN, Warden of the Queens House of Detention for Men,

Respondent.

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Appearance:

ARNOLD E. WALLACH, ESQ.
Attorney for Relator

J U D D, J.

*STATEMENT*

Relator has applied for a certificate of probable cause in aid of an appeal to the Court of Appeals from this court's Memorandum and Order dated June 13, 1974 which denied an application for federal habeas corpus. A four-page memorandum was written to set forth the basic facts and the reasons for dismissing the petition. The same reasons constitute an adequate statement of the reasons why a certificate of probable cause should not issue.

Relator may, of course, apply to a Circuit Judge pursuant to F.R.A.P. §22(b) for the issuance of such a certificate.

s/ ORRIN G. JUDD
U.S.D.J.

## APPENDIX "C"

## MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
EDWARD VASSALLO,

Relator,

-against-

ARTHUR RUBIN, Warden of the Queens
House of Detention for Men,

Respondent.

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June 13, 1974

Appearances:

ARNOLD E. WALLACH, ESQ.
Attorney for Relator

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Respondent

By: BURTON HERMAN, ESQ.
Assistant Attorney General

JUDD, J.

Relator, a state prisoner, has applied for federal habeas corpus.

*Facts*

Relator was convinced of manslaughter in the first degree after a trial before a jury in Queens County Supreme Court on an indictment charging him with murder. He was sentenced to a jail term of 12 years. It appears that state remedies have been exhausted.

Relator complains of errors in the trial court's charge in regard to the effect of flight and presumptions arising therefrom. Relator also asserts that his right to a speedy trial was improperly denied.

The killing took place on October 20, 1968. A search for relator by a New York City detective was unsuccessful. He was arrested in New Jersey on September 27, 1970, for a traffic violation, and showed a driver's license in another name. He was not arrested on the murder charge until June 1971. He was released on bail, and the case was set for trial on December 6, 1971 after disposition of defense motions. Further adjournments ensued, over defendant's objections, because of the district Attorney's inability to obtain the presence of two allegedly essential witnesses. On November 9, 1972, seventeen months after his arrest, relator's motion to dismiss the indictment for lack of a speedy trial was conditionally granted, unless the people were ready for trial by June 1, 1973, his bail was exonerated, and he was placed on parole. The court found that the delay up to that date was adequately explained, but that defendant was prejudiced by the lack of a firm trial date. Relator asserts that the court, instead of paroling him without bail, should have dismissed the indictment. His trial began on June 1,

1973, after a couple of days of hearings and jury selection.

The court charged the jury concerning the presumption of innocence, the burden of proof, and the fact that the defendant had no burden to prove his innocence, and that no inference could be drawn from the defendant's failure to take the witness stand. On the subject of flight, the court charged that it might be considered as indicative of a consciousness of guilt "when unexplained by the defense or falsely explained."

*Discussion*

The trial court's instructions concerning the effect of flight after the commission of an alleged crime were proper and cannot be characterized as a comment on relator's failure to take the witness stand. Cases in this circuit decided since *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), make it clear that comments by the prosecution on the failure of the defense to produce evidence contradicting the government's case are not improper where the comment does not "naturally and necessarily" refer to the defendant himself. *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050, 90 S.Ct. 1388 (1970); *United States v. Nasta*, 398 F.2d 283 (2d Cir. 1968).

In this case the trial court referred generally to the defense and not to the defendant himself. Moreover, the judge correctly instructed the jury on defendant's right to remain silent and on the burden of proof. In this context, the comments in the charge cannot be considered a violation of defendant's privilege against self-incrimination. There is nothing to the contrary in *Barnes v. United States*, U.S. , 93 S.Ct. 2357 (1973), which relator cites.

The delay in bringing relator to trial after he had been returned to the jurisdiction of the New York courts was caused by difficulties in locating a key prosecution witness. Such a delay is a factor to be considered in connection with a claim of deprivation of a right to a speedy trial. *United States v. Fasanaro,* 471 F.2d 717 (2d Cir. 1973).

The conditional granting of a motion to dismiss is not the same as a determination that there has been a denial of the right to a speedy trial. The case of *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260 (1973) is therefore inapplicable.

It is ORDERED that the petition be dismissed.

s/ORRIN G. JUDD
U.S.D.J.

## APPENDIX "D"

At a Criminal Term, Part VI, of the Supreme Court, held in and for the County of Queens, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, New York, on the 18th day of December, 1973

PRESENT:

Hon. GEORGE J. BALBACH
Justice

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD VASSALLO,

Defendant

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The following papers numbered 1 to 2 submitted in this motion, Notice of Motion and Affidavits Annexed, papers numbered 1-2.

Upon the foregoing papers, and the opinion of the Court herein, the application is denied.

GRANTED:

Dated December 18, 1973
John J. Durante

GEORGE J. BALBACH
J.S.C.

Submitted October 4, 1973

## APPENDIX "E"
## MEMORANDUM

SUPREME COURT QUEENS COUNTY
CRIMINAL TERM PART VI

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD VASSALLO,

Defendant.

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BY GEORGE J. BALBACH, J.

DATED December 18, 1973

Defendant moves for an order pursuant to section 44010 of the Criminal Procedure Law, vacating a judgment of conviction and granting him a new trial.

The defendant herein was indicted by a Queens County Grand Jury on November 12, 1968 and charged with the crime of murder. On June 8, 1973, after a jury trial, he was found guilty of manslaughter, first degree. On July 12, 1973, the defendant was sentenced to an indeterminate term the maximum of which was not to exceed 12 years. A notice of appeal to the Appellate Division, Second Department, was filed on July 25, 1973.

Defendant now seeks to vacate the judgment of conviction based on the decision of the Appellate Division, Second Department, in *People v. George Attard*, 346 NYS 2d 851, which held that the summation by the Assistant

District Attorney was both improper and highly prejudicial and denied defendant a fair trial and the charge by the Court concerning the presumption of innocence was confusing in that from it the jury could have been under the erroneous impression that the presumption of innocence continues only until they, in their discretion, shall decide that it should end.

The defendant in his moving papers claims that the Court's charge as to presumption of innocence is the same as in the *Attard* case. If defendant feels that this issue alone justifies reversal of the jury's verdict, it is clearly a matter of record (*People v. Sadness*, 300 N.Y. 69), and may be presented in the appeal now pending before the Appellate Division.

Based upon the foregoing, the application is hereby denied.

The clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant.

GEORGE J. BALBACH
J.S.C.